Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Petition for Declaratory Ruling to the Iowa Utilities Board and Contingent Petition for Preemption	WCB Docket No. 09-152

GREAT LAKES COMMUNICATION CORP. AND SUPERIOR TELEPHONE COOPERATIVE EMERGENCY MOTION FOR STAY OF IOWA UTILITIES BOARD FINAL ORDER PENDING REVIEW

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Great Lakes Communication Corp. ("Great Lakes"), and Superior Telephone Cooperative ("Superior"), (collectively the "Movants"), by their undersigned counsel and pursuant to 47 U.S.C. §§ 154(i), 154(j), hereby move the Federal Communications Commission ("Commission") to stay the effectiveness of the Final Order issued by the Iowa Utilities Board (the "IUB" or "Board") on September 21, 2009,[1] pending the Commission's review of the Petition for Declaratory Ruling in this docket. In addition, Movant Great Lakes specifically asks the Commission to order the North American Numbering Plan Administrator ("NANPA") and Pooling Administrator to refrain from executing the purported directive in the Final Order to commence reclamation of Great Lakes's numbering resources. Movants respectfully request expedited treatment of this Motion under 47 C.F.R. § 1.298 due to the short deadlines designated in the Final Order — the first of which would require a compliance filing today — and due to the grave injury that the Final Order will inflict on them.

Movants filed a Motion to Stay Effectiveness of Final Order with the Board on September 22, 2009. The Board has not ruled on that Motion, however, and thus Movants must seek relief from the Commission at this time.

I. PROCEDURAL BACKGROUND

Movants' Petition for Declaratory Ruling[2] is presently before the Commission and demonstrates that the IUB vastly exceeded its authority to regulate intrastate communications, deliberately encroached on the authority of the Commission to regulate interstate communications, and misinterpreted its authority regarding reclamation of numbering resources. The Final Order will irreparably harm Movants, and indeed all of the Iowa LECs, by attempting

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[1] *Qwest Communications Corp. v. Superior Telephone Cooperative*, Docket FCU 07-2, Final Order (Iowa Utils. Bd. Sep. 21, 2009) ("Final Order"). The Board appended the Final Order to its comments filed September 21, 2009.

[2] *Petition for Declaratory Ruling to the Iowa Utilities Board and Contingent Petition for Preemption*, WCB Dkt. No. 09-152 (filed Aug. 14, 2009) (the "Petition" or "Petition for Declaratory Ruling").

to reclaim, or begin the process of reclaiming, the telephone numbers they use in order to serve end user customers and to provide interstate access service. Great Lakes will incur the worst harm, because the IUB already has attempt to direct NANPA to seize its numbers. Final Order at 81.

On August 14, 2009, IUB conducted a "Decision Meeting" to announce its rulings in the dispute between Qwest Communications Corporation ("Qwest") and eight local exchange carriers in Iowa (the "Iowa LECs").[3] Immediately after the Decision Meeting, having heard the conclusions the Board had reached, Movants filed their Petition for Declaratory Ruling and Contingent Preemption with the Commission. In their Petition, Movants have asked the Commission to instruct the IUB not to exceed its jurisdictional authority and not to regulate interstate communications. On August 17, 2009, Movants filed a Motion to Stay Proceedings at the IUB, asking the Board not to release its Final Order before this Commission considered Movants' Petition for Declaratory Ruling.

On August 20, 2009, the Commission issued a Public Notice seeking comment on the Petition.[4] The Notice sought comment on the request for a ruling that "all matters relating to interstate access charges, including the rates therefor and revenue derived therefrom, are within [the Commission's] exclusive federal jurisdiction and thus any attempts by state authorities to regulate interstate access charges are beyond their authority." *Id.*[5] On August 21, 2009,

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[3] The "Iowa LECs," who were the Respondents before the Board, are Movants, Farmers Tel. Co. of Riceville, Iowa, Farmers & Merchants Mut. Tel. Co. of Wayland, Iowa, Interstate 35 Tel. Co., Dixon Tel. Co., Reasnor Tel. Co., LLC, and Aventure Communication Technology, LLC.

[4] *Comments Sought on Petition for Declaratory Ruling and Contingent Petition for Preemption of Great Lakes Communications Corp. and Superior Telephone Cooperative*, Public Notice, DA 09-1843, WC Docket No. 09-152 (Aug. 20, 2009).

[5] Prior to the Public Notice, the FCC had initiated a separate proceeding to consider "allegations that substantial growth in terminating access traffic may be causing carriers' rates to become unjust and unreasonable because the increased demand is increasing carriers' rates of return to levels significantly higher than the maximum allowed rate." *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket 07-135, Notice of Proposed Rulemaking, FCC 07-176, 22 FCC Rcd. 17989 (Oct. 2, 2007) at ¶ 1.

Movants supplemented their Motion for Stay at the IUB to inform the Board about the Commission's Public Notice.

Qwest filed a Motion to Suspend Comment Schedule on September 15, 2009, which Movants opposed on September 16. The Commission did not act upon that Motion.

On the afternoon of September 21, 2009, the day on which Initial Comments were due in this proceeding, the IUB released its Final Order. The Final Order denied the Movants' Motion to Stay Proceeding on the grounds that it was improper, and reified the findings of fact and conclusions of law that had been announced on August 14. On September 22, 2009, Movants filed a Motion to Stay Effectiveness of Final Order at the IUB on the ground that, first, the Commission had opened a docket to consider the Petition for Declaratory Ruling, and, secondly, Movants shortly would file an Application for Rehearing of the Final Order. On September 25, 2009, Movants filed their Application for Rehearing at the IUB which, pertinent to this proceeding, specifically identifies instances in which the Final Order conflicted with federal law, how the Board had exceeded its authority, and how the Board had misinterpreted federal law.[6]

Movants are compelled to file this Emergency Motion for Stay because the IUB has not ruled on their Motion to Stay, and because the Final Order commences, on an expedited basis, the process of forcing the Iowa LECs to disgorge their numbering resources. The Final Order, it turns out, was more egregious than expected, encroached on the Commission's jurisdiction more than had been expected, ignored relevant evidence and federal law in order to reach a predetermined outcome, and all done under the guise of limiting its application to intrastate traffic.

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[6] Great Lakes Communication Corp. and Superior Telephone Cooperative Application for Rehearing (Sept. 25, 2009), attached to Ex Parte letter from Ross A. Buntrock, Counsel to Great Lakes Communication Corp., to Marlene Dortch, FCC, WCB Docket No. 09-152 (filed Sept. 28, 2009).

II. THE COMMISSION HAS THE AUTHORITY TO ISSUE INJUNCTIVE RELIEF

The Commission has the authority to stay the Final Order. Under Section 4(i) of the Communications Act, "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[7] In addition, Section 4(j) provides in pertinent part that "[t]he Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."[8]

In addition, the Board must perform its delegated authority regarding numbering administration functions consistent with the Commission's rules.[9] The Commission plainly has the authority to oversee the exercise of that delegated authority which would include imposing injunctive relief on unlawful State Commission action.

The *Vonage* case provides another example in which the Commission preempted state action. The Commission recently granted Vonage's request for preemption of a Minnesota state regulation of Voice over Internet Protocol service. That service

> clearly enables intrastate communications, [and] it also enables interstate communications. It is therefore a jurisdictionally mixed service, and this **Commission has exclusive jurisdiction** under the Act to determine the policies and rules, if any, that govern the interstate aspect of that service.[10]

The Commission may even preempt State Commission action that reaches only intrastate matters. According to the Supreme Court, the Commission may preempt "otherwise legitimate

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7 47 U.S.C. § 154(i).

8 *Id.* § 154(j); *see also Charter Communs. Entertainment I, LLC Petition for Determination of Effective Competition in St. Louis, Missouri*, Memorandum Opinion and Order, 22 FCC Rcd 13890 (2007) ("*Charter Order*"); *AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd 14508, Memorandum Opinion and Order (1998); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 181 (1968) (FCC has the authority to issue interim injunctive relief under 47 U.S.C. § 154(i)).

9 47 C.F.R. § 52.9(b).

10 *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd. 22404, 22414 ¶ 18 (2004) ("*Vonage Order*").

state actions regulating intrastate telephone service could interfere with the Commission's achievement of its valid goal of providing interstate telephone users with the benefits of a free market and free choice."[11]

In this case, it is within the Commission's authority to stay the Final Order by the IUB, because it conflicts with federal law by: (1) directly regulating the provision of interstate communications; (2) contradicting Commission interpretations of the NECA interstate access tariff; and (3) violating the Commission's rules regarding reclamation of numbering resources.

III. COMMISSION STANDARD FOR ISSUANCE OF INJUNCTIVE RELIEF

The Commission considers four criteria, borrowed from federal jurisprudence, to evaluate requests for preliminary injunctive relief. A movant must demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.[12] A strong showing of irreparable harm is unnecessary, however, if the movant demonstrates a strong likelihood of success on the merits.[13]

The Commission's Media Bureau ("Bureau") in *Charter Communications* stayed an *ultra vires* attempt to regulate a communications provider by a state regulatory agency. In that case, Charter Communications successfully obtained a stay of a proceeding in which the City of St. Louis issued an order that retroactively lowered Charter's cable service rates, despite a strong likelihood that the City had no such authority.[14]

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[11] *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989) (Commission may regulate inside wiring in order to foster competition).

[12] *Charter Order*, 22 FCC Rcd. at 13892 (citing *Virginia Petroleum Jobbers Ass'n v FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

[13] *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985) ("Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or *vice versa*.").

[14] *Charter Order*, 22 FCC Rcd. at 13890-91.

The Bureau applied the four-factor test provided in *Virginia Petroleum Jobbers*.[15] It reasoned even without a fully developed record that Charter had submitted sufficient numerical evidence to demonstrate that the Commission, and not the City, had authority over its operations and rates because of the presence of effective competition.[16] Charter was thus likely to succeed on the merits because it was engaging in an activity over which the Commission had exclusive authority to regulate based on a Congressional grant of authority.[17] In addition, the Bureau found that Charter's subscribers would be adversely affected by a stay of the City's order to lower petitioner's rates.[18]

The Media Bureau granted a stay on the basis of Charter's likelihood of demonstrating success on the merits. That is, the likelihood of a finding that the City had no authority to regulate cable service rates which are exclusively within the Commission's jurisdiction.[19] The Bureau reasoned that the driving factor in considering a stay is the threshold question of whether the governmental body had the authority to do what it did.[20]

The Bureau also found that the public interest favored granting the stay.[21] It concluded that despite the short-term economic benefit of a rate reduction to Charter's subscribers, the City's effort to enforce an order it had no authority to issue in the first place, followed by Charter's efforts to recoup its losses, "would waste the time and energy" of both parties.[22] The public interest thus favored issuing the stay, because it is the general public — taxpayers and

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15 *Id.* at 13892.
16 *Id.*
17 *Charter Order*, 22 FCC Rcd. at 13892.
18 *Id.*
19 *Id.* at 13893.
20 *Id.*
21 *Id.*
22 *Charter Order*, 22 FCC Rcd. at 13893.

consumers — who would bear the costs of restoring the status quo.[23] For all these reasons, Charter's petition for stay was granted.

What is notable in the *Charter* case is that the Bureau did not see a strong showing of irreparable harm, because Charter would, it reasoned, likely be able to recoup the rate differential from its subscribers later if the petition ultimately succeeded.[24] Because Charter had demonstrated its likelihood of success on the merits, however, the stay was entered. Movants' request, by contrast, is supported not only by a strong showing on the merits but also the imminent danger that the Final Order will strip them of their end user telephone numbers and shut down their businesses.

Under the precedent of *Charter*, Movants deserve injunctive relief from the Final Order. Their likelihood of success in their substantive request for preemption is demonstrably high, and the severity of the harm that the Final Order — principally in the reclamation of the numbers that Great Lakes uses — would shortly impose is undeniable.

IV. ARGUMENT

A. Movants are Likely to Prevail on the Merits

Movants satisfy the first criteria for injunctive relief because they are likely to prevail on the merits of their claim that the Final Order warrants preemption. The Final Order attempts, though not expressly, to regulate interstate communications directly in several instances, and in several other respects seeks to render a state-based decision that necessarily impacts the interstate traffic that the Iowa LECs terminate

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23 *Id.*

24 *Id.* at 13892.

Under the Supremacy Clause, "Any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."[25] "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail."[26] With respect to state agency action, "State regulations which contravene the federal regulatory scheme are invalid under the supremacy clause."[27] The Commission itself has noted that: "It is well-established that '[p]re-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulations.'"[28] The Commission has used this authority consistently to prevent the erosion of its jurisdiction, to implement its rules and policies on a nationwide basis, and to implement the mandates of the Communications Act.[29]

The Final Order represents an egregious encroachment on the jurisdiction of the Commission to regulate interstate communications. First, the Board specifically intended to extend its authority to regulate the provision of interstate services. Second, the Final Order conflicts with *Farmers and Merchants*[30] and other applicable Commission precedent by interpreting the NECA interstate access tariff inconsistently with these cases. Third, the Board's directive to NANPA to begin reclamation of all telephone numbers assigned to Great Lakes' vastly exceeds its delegated authority. Finally, the Final Order creates an impossibility scenario,

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25 *Free v. Bland*, 369 U.S. 663, 666 (1962) (citing *Gibbons v. Ogden*, 9 Wheat. 1, 210-211 (1824) (C.J. Marshall); *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368-69 (1986) ("*Louisiana PSC*").

26 *Id.*

27 *Oberschachtsiek v. Iowa Dept. of Social Services*, 298 N.W.2d 302, 304 (Iowa 1980) (citations omitted); *see also Louisiana PSC*, 476 U.S. at 368-69.

28 *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, 15 FCC Rcd. 15168, 15172, ¶ 8 (2000) (citing *Fidelity Federal Sav. and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982)).

29 *E.g.*, *Vonage Order*, 19 FCC Rcd. at 22414 ¶ 18; *Petition for a Declaratory Ruling filed by National Association for Information Services, Audio Communications, Inc. and Ryder Communications, Inc.*, 8 FCC Rcd. 698 (1993), *aff'd* 10 FCC Rcd. 4153 (1995).

30 *Qwest Commc'ns Corp. v. Farmers and Merchants Mutual Tel, Co.*, Memorandum Opinion and Order, 22 FCC Rcd. 17973 (Oct. 2, 2007) ("*Farmers and Merchants Order*").

in which compliance with both federal regulations governing terminating access and the directives in the IUB Final Order cannot be accomplished simultaneously, and thwarts a clearly expressed Congressional policy of fostering competition, each of which *Louisiana PSC* established as independent grounds for preemption, 476 U.S. at 368

1. The Board is attempting to regulate interstate services.

From the plain language of the Final Order it is clear that the Board specifically intended to extend its authority to regulate the provision of interstate services. The Board ostensibly claims otherwise, but this assertion is not credible. The Board asserted that it "is aware of its jurisdictional limitations with respect to interstate and international traffic and as such has limited its findings in this final order to the intrastate issues raised in QCC's complaint." Final Order at 77. The Board, however, did not limit its findings to only the intrastate issues raised in the complaint.

One must only look three sentences into the Overview of the Final Order to realize how far afield the Board has ventured, and how the entire proceeding is not limited only to the exchange of intrastate traffic: "The scheme *originates* with local exchange carrier (LEC) members of the National Exchange Carrier Association (NECA) traffic sensitive pool *for interstate access charges.*" Final Order at 6 (emphasis added). The "NECA pool" pertains *only* to interstate access charges, yet the functioning of the NECA pool is the predominant focus of the entire decision.

- "*The NECA pool* generally ensures that a LEC will receive a minimum amount of access revenues[.]" *Id.* at 6 (emphasis added).
- "Carriers are allowed to opt-out of *the NECA pool*[.]" *Id.* (emphasis added).
- "After two years, carriers that have opted out of *the NECA pool* must re-enter the pool or be able to support their rates." *Id.* (emphasis added).

- "The LECs bill the IXCs for ... traffic using relatively high interstate switched access rates ($0.05 to $0.13 per minute) that were filed in individual tariffs after opting out of *the NECA pool*[.]" *Id.* (emphasis added).

- "By opting out of *the NECA pool*, the LECs are able to keep all of the additional revenue for themselves instead of sharing it with other members of the pool. However, if the LECs stay out of *the NECA pool* longer than two years, they have to recalculate their interstate rates based on the actual volumes produced by this traffic pumping scheme[.]" *Id.* at 7 (emphasis added).

- "QCC explained that most of the Respondents in this case are or were members of *the NECA traffic sensitive pool* for purposes of interstate access charges. *The NECA pool* generally ensures that a LEC will receive a minimum amount of access revenues, but excess access revenues must be shared with other LECs that are also members of the pool.... Carriers are allowed to opt-out of *the NECA pool* for a maximum period of two years and during this time, the carriers may keep all of their access revenues.... After two years, carriers that have opted-out of *the NECA pool* must re-enter the pool or be able show cost support for their rates." *Id.* at 45 (emphasis added).

- "In other situations, the laundering of the toll traffic would allow an ILEC to bypass the access sharing requirements of *the NECA pool* for an additional two years by transitioning access billing to an affiliated LEC." *Id.* at 46 (emphasis added).

- "QCC alleges that Farmers-Riceville, Reasnor, and Superior engaged in traffic laundering by applying their access rates to intrastate toll calls that were terminated in an exchange of an affiliated LEC for the purpose of increasing access charges to the IXCs or to avoid the access sharing requirements of *the NECA pool* for an additional two years." *Id.* at 47 (emphasis added).

The foundation of Qwest's entire case is so dependent on the operations of the NECA pool — which was a creation of the FCC in 1983, is governed pursuant to Part 69 of the FCC's regulations, and is clearly outside the Board's jurisdiction — that the Board is simply not credible when it claims it "has limited its findings in this final order to the intrastate issues raised in QCC's complaint."[31] The Board barely attempts to hide the fact that it is trying to regulate the operations of members of the NECA pool. Indeed, there is ample evidence that the Board does

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[31] Final Order at 77.

not recognize a distinction between tariffs it can enforce and tariffs it cannot: it repeatedly fails to distinguish between the intrastate Iowa Telecommunications Association access tariff and the interstate NECA access tariff.[32] It would have been easy for the Board to make those distinctions, and the fact that it failed to do so is telling as to the intended reach of its decision.

In addition, the Final Order renders several findings and conclusions that plainly affect interstate communications:

- Conference-calling and chat-line service providers are not "end users" under the terms of the NECA Interstate Tariff No. 5 and the LECs' local exchange service tariffs;[33]
- Conference-calling, chat-line and international VoIP traffic do not terminate at an end user's premises;[34]
- Conference-calling, chat-line and international VoIP traffic do not "terminate" within the LEC's local exchanges; [35]
- Revenue sharing between a LEC and its customer is not unlawful *per se*, but it is unreasonable under the facts in this case; [36]
- The IXCs engaged in self-help by withholding tariffed access charges from the LECs, but it was justified because they were not obligated to pay access charges; and[37]
- The *Farmers & Merchants* decision was not final and thus not applicable.[38]

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[32] For example, "The Respondents argue that *their tariffs* were properly applied to the FCSCs[.]" Final Order at 12. "Public utilities in Iowa, including LECs, are required to comply with the terms and conditions of *their tariffs*, pursuant to the first unnumbered paragraph of Iowa Code § 476.5[.]" *Id.* at 13. "As such, the Respondents are required to comply with the terms and conditions of *their tariffs* as set forth in Iowa Code § 476.5." *Id.* at 14. "Accordingly, the Board finds that the Respondents are public utilities subject to rate regulation, pursuant to § 476.11, and as such are required to comply with the terms and conditions of *their [intrastate] tariffs*, pursuant to § 476.5." *Id.* "The Board also finds that it has the jurisdiction and authority to assess the Respondents' interconnections with the IXCs, pursuant to § 476.11, interpret *their [intrastate] tariffs*, apply the terms of *their tariffs* to the facts in this case[.]"*Id.* at 14-15. "The Respondents contend that these relationships are permitted under *their tariffs* and existing law." *Id.* at 19. "Respondents did not intend to bill the FCSCs for any services under *their tariffs*, as required in order for intrastate access charges to apply[.]" *Id.* at 25. "Specifically, the Respondents did not comply with the billing requirements of *their tariffs* when they did not send the FCSCs monthly local exchange invoices[.]" *Id.* at 25.

[33] *Id.* at 53.

[34] *Id.* at 37-40

[35] *Id.* at 42.

[36] Final Order at 57-59.

[37] *Id.* at 70.

These conclusions directly impact interstate traffic and the manner in which the Iowa LECs assess terminating access for that traffic. Based on these conclusions, the Board has already instituted relief that likewise reaches both intrastate and interstate matters:

- IXCs must file "their calculations of the amount of terminating switched access fees" within 30 days, and may conduct new discovery on the Iowa LECs in order to make these calculations;[39]
- The IUB directed NANPA and the Pooling Administrator to commence reclamation of Great Lakes's numbering resources;[40] and
- By October 1, 2009, LECs must report all telephone numbers they have assigned to conference-calling, chat-line, and international VoIP service providers for possible reclamation. [41]

The Final Order is replete with instances in which the Board interprets instruments of federal law, such as the NECA tariff, reaches decisions that directly impact interstate communications, and purports to regulate federal matters that are not within its jurisdiction. Preemption of almost every aspect of the Final Order is therefore warranted. *Bland*, 369 U.S. at 666; *Louisiana PSC*, 476 U.S. at 368.

2. The Final Order conflicts with federal law.

Movants are also likely to prevail on the merits because the Board ignored relevant Commission precedent, and in so doing, has created conflicts between state law and federal law. The Supreme Court in *Louisiana PSC* identified the creation of an "outright or actual conflict between federal and state law" as a ground for preempting state actions. 476 U.S. at 368. Movants have identified several examples of the Final Order creating a conflict with Commission precedent:

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38 *Id.* at 29.

39 *Id.* at 80. The Board simply refers to "the traffic at issue in this case" but does not make clear that the order applies only to intrastate traffic. And because the Board denied Movants' request to exclude evidence regarding interstate traffic, the "traffic at issue in this case" may be deemed to include interstate calls.

40 *Id.* at 67.

41 *Id.*

- **IUB:** The *Farmers and Merchants Order* is not final. Final Order at 29.

    - **FEDERAL LAW:** The Commission has never stated that the *Farmers and Merchants Order* has been reversed, vacated, or reconsidered, and expressly stated that the grant of Qwest's petition for additional discovery did not indicate that the ruling in that case will change. Order on Reconsideration, 23 FCC Rcd. 1615, 1617 ¶ 7 (2009).

- **IUB:** FCSCs do not subscribe to the LECs' switched access or local exchange tariffs. Final Order at 77.

    - **FEDERAL LAW:** Directly contravenes the *Farmers and Merchants* decision, interpreting identical tariff language. 22 FCC Rcd. at 17987, ¶ 38.

- **IUB:** FCSCs are not End Users of the LECs. Final Order at 78.

    - **FEDERAL LAW:** Directly contravenes the *Farmers and Merchants* decision, interpreting identical tariff language. 22 FCC Rcd. at 17987, ¶ 38.

- **IUB:** LECs did not net, or offset, fees to the FCSCs. Final Order at 78.

    - **FEDERAL LAW:** *Farmers and Merchants* finds the manner in which money is exchanged is not relevant. 22 FCC Rcd. at 17987, ¶ 38.

- **IUB:** LECs did not provide local exchange service through special contract arrangements. Final Order at 78.

    - **FEDERAL LAW:** *Farmers and Merchants* finds that conference call and chat-line providers are end users despite receiving service under special contracts. 22 FCC Rcd. at 17987, ¶ 38.

- **IUB:** FCSCs acted as "business partners" of LECs. Final Order at 78.

    - **FEDERAL LAW:** *Farmers and Merchants* found that conference call and chat-line providers are "end users" under identical tariff language. 22 FCC Rcd. at 17987, ¶ 38.

- **IUB:** Revenue sharing is an indication that a particular service arrangement may be unreasonable. Final Order at 78.

    - **FEDERAL LAW:** The Commission expressly rejected identical claims in *Jefferson*, *Frontier*, *Beehive* and *Farmers and Merchants*, and in *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853,14899-900 (2005).

- **IUB:** Assigning numbers to FCSCs is improper. Final Order at 78.
    - **FEDERAL LAW:** *Farmers and Merchants* never finds that assigning numbers to conference call and chat-line providers is improper. 22 FCC Rcd. at 17987, ¶¶ 30-38.
- **IUB:** FCSC calls did not terminate at the End User's premises. Final Order at 78.
    - **FEDERAL LAW:** *Farmers and Merchants* found that calls to conference call providers "terminate" and are compensable. 22 FCC Rcd. at 17986, ¶¶ 35-36.
- **IUB:** FCSC calls did not terminate within the LECs local exchange areas. Final Order at 78.
    - **FEDERAL LAW:** *Farmers and Merchants* found that calls to conference call providers "terminate" and are compensable. 22 FCC Rcd. at 17986, ¶¶ 35-36.
- **IUB:** Use of Foreign Exchange arrangements constitutes unlawful "traffic laundering." Final Order at 78.
    - **FEDERAL LAW:** Foreign Exchange arrangements, like "Virtual NXX" are not unlawful. *Starpower Communications, LLC v. Verizon South Inc.*, Memorandum Opinion and Order, 18 FCC Rcd. 23625 (2003).

These myriad conflicts with federal law that the Iowa Board has created require preemption of the Final Order under *Louisiana PSC*. The Board has simply ignored the Commission's rich precedent governing terminating access service — and presumed to decide that the *Farmers and Merchants Order* is not good law — and in so doing rendered an order that directly contravenes federal law. According to the Supreme Court, the existence of these conflicts warrants preemption of the Final Order. 476 U.S. at 368.

3. The IUB's purported directive to NANPA for reclamation of Great Lakes's numbers exceeds its authority.

Movants are also likely to prevail on the merits of their claim that the Final Order should be preempted because the Board exceeded its delegated authority regarding the reclamation of telephone numbers. In purported reliance on 47 C.F.R. § 52.15, the Final Order directs the

"North American Numbering Plan Administrator and the Pooling Administrator ... to commence reclamation proceedings of all blocks of telephone numbers assigned to Great Lakes Communications Corp."[42] This directive grossly exceeds the authority that the Commission has delegated to State Commissions and directly contradicts applicable federal law.

The Commission has primacy of jurisdiction over numbering resources. 47 U.S.C. § 251(e). The Commission's chief imperative with regard to numbers is ensuring their fair distribution and to prevent unused numbers from being retained by any carrier for an unreasonable length of time.[43]

Although the Commission may delegate its authority to states, 47 U.S.C. § 251(e)(1), a state commission has only limited authority to order number reclamation. 47 C.F.R. § 52.15(i). State authority to reclaim numbers shall *only* be exercised when there is a clear showing that numbers have not been activated in a timely manner:

> (2) State commissions may investigate and determine whether service providers *have activated their numbering resources* and may request proof from all service providers that numbering resources have been activated and assignment of telephone numbers have commenced.

47 C.F.R. § 52.15(i)(2) (emphasis added). As such, a reclamation directive is only appropriate if "the state commission is satisfied that the service provider *has not activated* and commenced assignment to end users of their numbering resources within six months of receipt." 47 C.F.R. § 52.15(i)(5). As the FCC noted in its first *Numbering Resource Optimization Order*, "we grant authority to state commission to investigate and determine whether code holders have 'activated'

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42 Final Order at 81.

43 For example, the Commission established numbering rules in 2000 for the reclamation of numbers in order "to ensure the return of unused numbers to the NANP inventory for assignment to other carriers." *In the Matter of Numbering Resource Optimization*, Report and Order and Further Notice of Proposed Rule Making, CC Docket 99-200, FCC 00-104, 15 FCC Rcd. 7574, ¶ 5 (March 31, 2000) ("*Numbering Resource Optimization Order*"); *see also* 47 C.F.R. §§ 52.105, 52.107 ("warehousing" and "hoarding" toll-free telephone numbers are unreasonable practices under the Act).

NXXs assigned to them within the time frames specified in this proceeding."[44] But NANPA should comply with a state directive to reclaim an NXX code only "if the state commission is satisfied that the code holder has not activated the code within the time specified" in accordance with the *First Numbering Resource Optimization Order*.[45] *Id.*

Here, the Board did not follow the prescribed threshold procedure that could possibly make its reclamation directive an appropriate exercise of state authority. It based its decision on its conclusion —which as explained above is flawed and in conflict with federal law — that Great Lakes was using its numbers only for service to conference-calling and chat-line service providers, and that such customers were not "end users" under the terms of the NECA interstate access tariff.[46] Its attempt to strip Great Lakes's numbers is thus well outside the bounds of its limited delegated authority.

In addition, the Board's purported directive for reclamation of Great Lakes's numbers creates an impermissible barrier to entry under Section 253 of the Act. Under Section 253,

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

47 U.S.C. § 253. The IUB's directive to NANPA would preclude Great Lakes from being able to provide any telecommunications service, whether intrastate or interstate, in violation of Section 253. The Board thus stands in derogation of federal law, and is thwarting a clearly expressed Congressional goal of furthering competition. This error is independent grounds for preemption.[47]

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44 *Numbering Resource Optimization Order*, 15 FCC Rcd. at 7680-81 ¶ 237.
45 *Id.*
46 Final Order at 66-67.
47 *Louisiana PSC*, 476 U.S. at 369.

The Board has abused its limited delegated authority by invoking the reclamation process as a means of prohibiting Great Lakes from serving conference call and chat-line providers. The FCC numbering rules plainly were not intended to be used as a means of putting a carrier out of business. Moreover, the Board's rationale conflicts directly with federal law and itself warrants preemption. Movants are likely to prevail on this aspect of their Petition, and thus injunctive relief in the form of a stay is warranted.

4. The Final Order warrants preemption on other grounds.

Movants are also likely to prevail on the merits of the Petition on several other grounds. First, the Commission has occupied the field, leaving the Board no room to rule on the issue of compensation for calls to conference-call and chat-line service providers. *See Louisiana PSC*, 476 U.S. at 368. On October 2, 2007, the Commission issued a Notice of Proposed Rulemaking ("NPRM") in WC Docket 07-135 specifically to address IXC complaints regarding LEC terminating access service.[48] That proceeding is already considering all of the issues addressed in the Final Order.[49] Because the Final Order impinges on rulemaking and policy issues actively under consideration by the FCC, and in which the Commission has occupied the field, the Final Order merits preemption. *Louisiana PSC*, 476 U.S. at 368.

Second, the Final Order flouts the Commission's prohibition on self-help refusals to pay access charges. The Board completely exonerates the IXCs' use of self-help by simply refusing to pay tariffed access charges. Final Order at 70. Although the Board stated that "unilaterally withholding payment is not a preferred form of dispute resolution in economic disputes between carriers," it decided that the IXCs were justified under the circumstances of the case because the Board ultimately ruled in their favor. *Id.* This approach is not consistent with the Commission's

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[48] *Establishing Just and Reasonable Rates for Local Exchange Carriers*, 22 FCC Rcd. 17989 (2007) ("07-135 NPRM").

[49] *See* Petition for Declaratory Ruling at 26-27 (discussing scope of WC Docket 07-135).

clear policy on the problem of IXCs withholding tariffed access charges, for example its statement in the *Seventh Report and Order* that "We are concerned that the IXCs appear routinely to be flouting their obligations under the tariff system."[50] This holding is consistent with decades of Commission precedent prohibiting self help. "[T]he law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties ... ."[51] Because the Final Order effectively validates the IXCs' unlawful conduct, Movants are likely to demonstrate on the merits that the Final Order conflicts with federal law and should be preempted. *Louisiana PSC*, 476 U.S. at 369.

Third, the Final Order creates an impossibility scenario, because it includes rulings on what is a "premises," who is an "end user," and what it means to "terminate" traffic under the access charge regime. These rulings apply to all traffic, and thus necessarily impact interstate communications. Yet, as explained above, the Commission has reached conclusions on these issues that are directly contrary to the Board's. As such, the Iowa LECs cannot know how to configure their service or to impose access fees in a manner that follows both sets of rulings. This scenario typifies the "physically impossible" problem that the Supreme Court identified in *Louisiana PSC* and for which the Court permits preemption of state action. 476 U.S. at 369.

Finally, the Final Order encroaches on Commission jurisdiction by regulating traffic that uses Internet protocol to route calls to overseas numbers. Final Order at 42-43. The impropriety of such a ruling is clear on its face. The Commission is vested with exclusive jurisdiction over international traffic. 47 U.S.C. § 152(a). Moreover, the Commission has on multiple occasions

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50 *Seventh Report and Order*, 16 FCC Rcd. 9923, 9932, ¶ 23 (citations omitted).

51 *Tel-Central of Jefferson City, Missouri, Inc. v. United Telephone of Missouri, Inc.*, 4 FCC Rcd. 8338, 8339, ¶ 9 (1989) (*Tel-Central*); *see also Communique Telecommunications, Inc. DBA Logicall*, 10 FCC Rcd. 10399, 10405, ¶ 36 (1995); Petition for Declaratory Ruling at 27-29 (discussing Commission policy and precedent regarding withholding of tariffed access charges).

asserted exclusive jurisdiction over Internet-based communications,[52] including IP-based calling card calls.[53] It is likely to do so again here with regard to the VoIP-based international calling services that the Iowa LECs provided and for which they have been denied terminating access.

These additional errors in the Final Order provide still further support for the Petition and render Movants likely to succeed on the merits. As such, Movants have satisfied the first criterion for stay.

* * *

Qwest has opposed Movants' request for stay at the Board, arguing that although the Final Order affects interstate communications, it "does not mean that the Board's decision is unlawful or that the FCC will grant the Movants' FCC Petition."[54] This argument, however, belittles the crucial boundary between state and federal authority. *E.g.*, *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148 (1930). Moreover, it ignores the Supreme Court's instruction in *Louisiana PSC* that state regulation cannot conflict with federal law, render compliance with both federal and state law impossible, or thwart an express goal of Congress. 476 U.S. at 369.

Further, the cases on which Qwest relies fail to offer Qwest any support. For example, Qwest cites *WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262 (10th Cir. 2007), for the proposition that the Supreme Court in *Louisiana PSC* rejected the notion that all state action impacting interstate communications must be preempted. In *WWC Holding Co.*, a mobile service provider sought preemption of a state commission decision imposing consumer protection safeguards at the same time it granted the mobile service provider eligibility to receive federal universal service funds. That case has no application here, however. First, there was no

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52 *E.g.*, *Vonage Order*, 19 FCC Rcd. at 22414 ¶ 18.

53 *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd. 4826 (2005).

54 Docket No. FCU-07-2, Qwest Opposition to Great Lakes and Superior Telephone's Motion to Stay Effectiveness of the Board's Final Order at 5 (Sep. 30, 2009).

conflict between state law and federal law in *WWC Holding Co.*, so it is not applicable to the facts of this case. Second, Qwest skips past the section of the opinion that explains that Congress and the FCC expressly delegated authority to state commissions for this task, obviously anticipating that it would reach into the interstate sphere since federal universal service funds were at stake. *Id.* at 1273. Thus, although *WWC Holding Co.* might be applicable if Congress and the FCC had expressly delegated authority over interstate conference and chat-line calls, that delegation never took place here.

Qwest's reliance on *LDDS Commc'ns, Inc. v. United Telephone of Florida*, 15 FCC Rcd. 4950 (2000), is also misplaced. That case concerned the ministerial task of separating intrastate and interstate access charges. Indeed, in refusing to exercise jurisdiction in this case, the Commission noted that LDDS's complaint could not be fairly read to object to the *credit* it was receiving towards its interstate access bills, but rather the retroactive increase in liability for intrastate access. *Id.* at 4955, ¶ 13. Further, *LDDS* involved the interpretation of intrastate and interstate tariffs that contained drastically different tariff language. *Id.* at 4952, ¶ 6.

Here by contrast, Movant Great Lakes seeks relief from the IUB's Final Order, the effects of which will prevent it from providing telecommunications services entirely, irrespective of the jurisdictional nature of the traffic involved. And as Movants have already demonstrated, the share of the IXCs' customers' traffic that is jurisdictionally intrastate is *de minimis*. Moreover, the IUB's findings were based on its analysis of the language of Movants' *inter*state access tariffs. The Commission is correct — indeed, required — to refuse jurisdiction over controversies that only touch upon intrastate matters such as in *LDDS*. Here, however, the IUB's Final Order clearly regulates interstate telecommunications so as to require the Commission to

preempt the Final Order. Thus, Qwest's grounds for opposing Movants' request for stay before the IUB are baseless.

Qwest is not likely to provide a more compelling opposition here. Movants have set forth so many instances in the Final Order of *ultra vires* or improper state action that the likelihood of their succeeding on the Petition is quite high. The Board could have but did not limit its decision to intrastate matters, and has created such a deep and irreconcilable conflict between state and federal law that preemption is clearly warranted. Movants therefore have satisfied the first prong of the Commission's test for imposing injunctive relief.[55]

B. Movants Will Suffer Irreparable Harm Absent a Stay

Movants amply satisfy the second element for injunctive relief because Great Lakes will suffer severe irreparable harm absent a stay of the Final Order. The Board has issued a directive to NANPA to begin reclaiming the numbering resources of Great Lakes. Without telephone numbers, Great Lakes will have no ability to provide *any* telecommunications services to its customers. The Board's directive will simply drive Great Lakes out of business. Courts have consistently found that the loss of an ongoing business constitutes irreparable harm that warrants injunctive relief.[56]

In addition, the Final Order imperils the numbers of every other Iowa LEC in that proceeding, because it requires each of them to file today a list of all numbers that are not assigned to "end users." Final Order at 80. Of course, under the flawed logic of the Final Order, no conference call, chat-line, or international calling service provider are "end users," and thus

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[55] *Charter Order*, 22 FCC Rcd. at 13892, ¶ 4.

[56] *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Wisconsin Gas Company v. Federal Energy Regulatory Commission*, 758 F.2d 669, 673 (D.C. Cir.1985); *Ahmed v. United States*, 47 F. Supp. 2d 389, 400 (W.D.N.Y. 1999) (store owner's averment that administrative sanctions would force him out of business was sufficient to establish irreparable harm); *American Cyanamid Co. v. U.S. Surgical Corp.*, 833 F. Supp. 92, 123 (D. Conn. 1992).

the Final Order purports to cover what potentially are thousands of telephone numbers. Plainly the Board is preparing to commence a reclamation proceeding against the other Iowa LECs. This action must be stayed to prevent the other Iowa LECs from facing the same business-ending reclamation that Great Lakes now faces.

Finally, the Board's decision contemplates that two additional proceedings will be opened that stem from its findings in Docket FCU 07-2. The first is a show cause proceeding to consider whether to revoke Great Lakes's state certification entirely.[57] The second, which already has begun, is an investigation of "High Volume Access Service" to determine whether "high-volume" traffic should be compensated and, if so, at what rate.[58] These new proceedings stem from decisions made in Docket FCU 07-2 that are unlawful *ultra vires* actions or are otherwise contrary to law. As such, they are equally tainted and should not be permitted to proceed until the Final Order is reviewed.

The far-reaching and dire effects of the Final Order will impose, almost immediately, irreparable harm on Movants and the other Iowa LECs. The severity of this harm in itself warrants injunctive relief. Movants therefore have satisfied the second prong of the Commission's test for imposing injunctive relief.[59]

C. Other Interested Parties Will Not Be Harmed If the Stay Is Granted

No other interested parties will be harmed if the stay is granted.[60] Movants' adversaries in the Iowa proceeding are major long-distance carriers: Qwest, AT&T and Sprint. Staying the Board's order for refunds will not harm these IXCs. They have not paid terminating access to

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[57] Transcript of Decision Meeting at 6 (appended as Exhibit A to Opposition to Motion to Suspend Comment Schedule).

[58] Docket RMU 2009-09, *High Volume Access Service* (199 IAC 22), Order Initiating Rulemaking (Sept. 18, 2009).

[59] *Charter Order*, 22 FCC Rcd. at 13892, ¶ 4.

[60] According to Commission precedent, the Board itself is not an interested party. *Charter Order*, 22 FCC Rcd at 13892, ¶ 7.

the Iowa LECs for more than two years and continue to withhold payment. Conversely, they continue to collect revenues from their retail long-distance customers who place the calls to the LECs' end-user customers. Accordingly, although the IXCs would still be flouting their obligations under the tariff system and numerous Commission rules and regulations, the grant of a stay would maintain the *status quo* that is already favorable to the IXCs. In addition, the IXCs' customers, who have been availing themselves of the conference and chat-line services, will continue to have a viable option to the IXCs' "host pays" expensive conferencing service alternatives.

A stay of the Board's decision authorizing additional discovery (Final Order at 80) likewise will not harm the IXCs. The access invoices and other records of the traffic which the Iowa LECs terminated are in large part already compiled and produced, and there is no danger that a stay of the Final Order will alter that circumstance. If in fact the IXCs are found to deserve refunds, any information necessary to implement that order will be available to them.

Entry of a stay will simply maintain the *status quo* by which the IXCs' traffic continues to be terminated and the Iowa LECs retain their ability to serve customers. Movants thus amply satisfy the third prong of the Commission's test for imposing injunctive relief.[61]

D. The Public Interest Favors Granting a Stay

Movants also satisfy the fourth element for injunctive relief, that the public interest favors granting a stay of the Final Order. Just as the Media Bureau recognized in the *Charter Order*, there are no benefits to complying with an order that the Board had no authority to issue in the first instance.[62] Plainly the public would not be served by enforcement of the Board's *ultra vires* directives. Movants, who are presently serving the public, would be forced to temporarily

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61 *Id.* at 13892, ¶ 4.

62 *Id.* at 13893 ¶ 9.

suspend their relationships with important end-user customers pending resolution of their Petition for Declaratory Ruling, with no guarantee the relationship will resume after the Commission asserts its jurisdictional authority. "The public interest counsels against such waste."[63]

In addition, as explained above, the Commission has important jurisdictional boundaries to enforce. And it now is faced with a decision by a state agency that defies the Commission's precedent. That state decision also encroaches on the jurisdiction of the Commission by intentionally regulating the provision of interstate services and by interpreting terms in the NECA interstate access tariff in such a way that it creates a conflict with federal law. The state decision also misinterprets the Commission's rules regarding the delegation of authority to reclaim numbering resources. In order for the Commission's rules and regulations to have compelling effect, state decisions that may overreach or contravene Commission precedent should be stayed. As such, the public interest here weighs strongly in favor of staying the Final Order pending the Commission's consideration of the Petition for Declaratory Ruling and Contingent Preemption. Movants therefore have satisfied the fourth prong of the Commission's test for imposing injunctive relief.[64]

CONCLUSION

For all these reasons, the Commission should stay the Iowa Utilities Board Final Order unless and until the Commission denies the Petition for Declaratory Ruling and Contingent Preemption.

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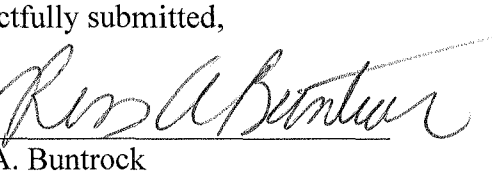
63 *Charter Order*, 22 FCC Rcd. at 13893, ¶ 9.
64 *Charter Order*, 22 FCC Rcd. at 13892, ¶ 4.

October 1, 2009

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I, Edilma Carr, hereby certify that on this 1st day of October, 2009, the foregoing Great Lakes Communication Corp. and Superior Telephone Cooperative Emergency Motion for Stay of Iowa Utilities Board Final Order Pending Review to be served on the following persons via ECFS, First Class Mail *, or electronic mail **:

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